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No. 85-591

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

W.C. GARCIA & ASSOCIATES, INC.,

Petitioner,

—v.—

MICHAEL D. SASSI, DISTRICT DIRECTOR,
INTERNAL REVENUE SERVICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER IN RESPONSE TO BRIEF FOR THE RESPONDENT IN OPPOSITION

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ARGUMENT

The Government ought not be allowed to moot the Taxpayer's injunction argument by seizing its assets and applying them to an invalid assessment particularly where this Court has implicitly held such a seizure does not moot such arguments. *Laing v. United States*, 423 U.S. 161 (1976). Nor should the Government be successful in arguing that *Rosenman v. United States*, 323 U.S. 658 (1945), supports its contention that a cash bond applied to an invalid assessment is a payment of such an

* The Rule 28.1 listing was complied with by letter to the Clerk of the Court dated October 10, 1985. That letter is currently accurate.

assessment. If the Government is successful in such arguments it will have the power to deny taxpayers the right Congress gave them to resolve such disputes through injunction actions. The Taxpayer asks this Court to state explicitly that which this Court has implicitly stated.

1. The Government argues that any assessment, even an invalid assessment (Br. 8, n. 4)[1], that is followed by the Government's seizing assets of the Taxpayer[2] can only be remedied by filing a claim for refund and then, if necessary, filing a suit for refund (Br. 8-9). Such argument, however, is contrary to the implicit holding and the result in *Laing v. United States*, *supra*, (Pet. 14).[3]

The chronology of the relevant facts in *Laing v. United States*, *supra*, is similar to that in this case. The IRS made an assessment against Mr. Laing, he refused to pay the tax, the IRS seized currency that had been found in the automobile in which Mr. Laing and two companions were traveling, and the IRS applied a portion of the seized funds to the tax assessed

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1 Br. refers to the Brief For the Respondent In Opposition.

2 The Government incorrectly attempts to establish that the Taxpayer had a choice of remitting the check of $137,763.31 or seeking a stay pending appeal (Br. 4, 8-9). The letter sent with the check in issue (Pet. 5-6) establishes the only choice the taxpayer had was to send the check or have its other assets seized. The district court refused to grant even a temporary restraining order while the injunction action was being considered (CR 7, p. 12). The district court stated that collection action was being withheld at the "sufferance" of the Government (CR 7, p. 14). The Summary Judgment hearing was on May 21, 1984, a Friday (CR 24). On Monday, May 24, 1984, the threat of seizure of assets was made by the IRS (Pet. 5-6). If the IRS did not then obtain a verbal commitment that a check would be mailed, it stated it would seize the Taxpayer's bank accounts. The first business day after Summary Judgment was granted to the Government, the threat of immediate seizure was made, which prevented the Taxpayer from taking any step but to send the check of $137,763.31. There was no time to make any motion for a stay.

3 Such argument also proves the validity of the Taxpayer's argument as to what the Government can do, at least in the Ninth Circuit, if the order of the court of appeals is allowed to stand (Pet. 15).

against Mr. Laing. *Laing v. United States*, *supra*, at 165-166. This Court did not find the amounts seized and applied against Mr. Laing's assessment to be a "payment", thus causing his injunction action to be moot. There is no mention of an argument by the Government that Mr. Laing should have obtained a stay which the Government argues in this case. The Government's argument in this case (Br. 8) ignores the implicit holding by this Court in *Laing v. United States*, *supra*. (Also see Pet. 13-14). Here the Government argues that even if the assessment is illegal, once the Taxpayer's assets have been seized by the IRS and applied to such assessment, the injunction action becomes moot (Br. 8).

The Government has not attempted to reconcile its position concerning invalid assessments with *Laing v. United States*, *supra*, nor with the absolute prohibition contained in Section 6213(a), I.R.C. of 1954, against such assessments.

2. Notwithstanding its argument that the validity of an assessment is not relevant, the Government does attempt to have its assessment in this case recognized as being valid. The Government has introduced some arguments relative to a Form 870-C, "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment" (Br. 2-3).

Waiver is an affirmative defense (Fed.R.Civ.P. 8(c)). Therefore, the Government was required to raise the issue by answer or motion (Fed.R.Civ.P. 12(b)), but it never did.[4] Indeed, the Government expressly stated in oral argument in the district court that the waiver issue was not relevant (CR 28, pp. 14-15) and the Government conceded that it did not mail a notice of deficiency (CR 28, p. 15).

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4 See also, *Dierks v. United States*, 215 F.Supp. 338 (S.D.N.Y. 1963), where an assessment was based on a stipulation in a Tax Court case but the taxpayer contested the validity of the stipulation and so the court held that the Government must show the validity of the stipulation.

Even when the Government filed its Notice and Motion For Summary Judgment (CR 13), it did not raise the issue of waiver. The motion for summary judgment is based solely on the claim of the Government that the Taxpayer is not entitled to injunctive relief because it cannot establish irreparable injury and lack of an adequate legal remedy. The motion is devoid of any reference to any alleged waiver by the Taxpayer of the restrictions under Section 6213(a), I.R.C. of 1954, on assessment and collection of tax (CR 13, pp. 1-2). The Taxpayer never had the opportunity to litigate the waiver issue nor had there ever been a need to do so. The Taxpayer has always denied that the Form 870-C ever became effective.

Since there is no basis in the record to find that the assessment was based on an effective Form 870-C, and since the Government has conceded that no notice of a deficiency has been mailed to the Taxpayer, there is no basis to find that the assessment is valid.

3. The Government contends that the decision below does not conflict with *Rosenman v. United States*, 323 U.S. 658 (1945), because the remittance was made almost five years after the assessment and it thus became a payment immediately; that the remittance was a payment even if the assessment was illegal and void; and that it is the *fact*, not the *validity*, of the assessment that determines the status of the Taxpayer's remittance as a "payment" rather than a "cash bond" (Br., pp. 7-8). The Government cites no authority which supports this novel proposition of law and the Taxpayer has found none.

The Government asserts that the taxpayers in *Rosenman v. United States*, *supra*, similarly complained on the merits of an "alleged illegal assessment", but that allegation did not stop the assessment from converting the deposit into a "payment" (Br., p. 8, n. 4).

The facts in *Rosenman v. United States*, *supra*, establish the validity of the assessments therein. On February 25, 1935, the taxpayers filed their estate tax return showing tax due of

$80,224.24, which amount was assessed under their return. Upon completion of the audit of the return, the IRS determined that the total net tax due was $128,759.08 and issued a notice of deficiency. No appeal to the Board of Tax Appeals (the former name of the Tax Court) having been taken, in April 1938, a deficiency of $48,534.84 was assessed. The IRS thereupon applied the balance of $39,775.76 standing to the credit of the taxpayers in the suspense account in partial satisfaction of the deficiency and on April 22, 1938, the taxpayers paid the IRS the additional amount of $10,497.34, which covered the remainder of the deficiency plus interest.

Neither party contended that the assessments were illegal and void. The assessment of the tax shown due on the return was made under the authority of the predecessor of Section 6201(a)(1), I.R.C. of 1954. The assessment of the deficiency was made pursuant to the deficiency procedures authorized by the predecessor of Section 6213(a), I.R.C. of 1954, after a notice of deficiency had been issued and the taxpayers had failed to file a petition in the Board of Tax Appeals contesting the deficiency. Far from complaining that the assessment had converted their deposit into a payment, the taxpayers relied on the assessment in contending that the balance of $39,775.76 standing to the credit of the taxpayers, part of a remittance of $120,000 which they had made in 1934, did not become a payment of tax prior to the assessment of the deficiency. True, the taxpayers claimed that on the merits, the tax was erroneously assessed, that is, that the assessment was greater than their correct estate tax liability. But they did not contend, and the Court did not hold, that the assessment was illegal and void as having been made in contravention of the procedures in the controlling revenue laws for the making of assessments of estate tax.

Laing v. United States, *supra*, refutes the Government's contention that the remittance made under the circumstances of this case became a payment of the tax by virtue of the illegal and void assessment herein (Pet. 14).

Rosenman v. United States, *supra*, stands for the proposition that a remittance which does not admit, but specifically denies, liability for, and is not intended to satisfy, an asserted deficiency in income, estate or gift tax, does not become a payment prior to a legal and valid assessment of the tax under the procedures in the controlling revenue laws for the making of assessments of such tax. In this case, there was neither an acquiescence in the proposed deficiency nor a legal and valid assessment of it, since no notice of deficiency was issued. Therefore, the court of appeals' holding, that the remittance constitutes payment of the tax, is in conflict with *Rosenman v. United States*, *supra*. Under that decision and the facts in this case, the remittance made on May 30, 1984, was not payment of the void and illegal assessment, but was a mere deposit in the nature of a cash bond.

The Government's argument that a refund suit is an adequate remedy begs the question. Congress has already given this Taxpayer, and all other taxpayers similarly situated, a different remedy. Under Section 6213(a), I.R.C. of 1954, Congress gave all taxpayers the right to an injunction in cases such as this. The Government's argument, if successful, will deny this Taxpayer, and all taxpayers similarly situated, that right to an injunction.

From a review of the Taxpayer's petition for a writ of certiorari and the Government's brief, there is no basis to find that the assessment is valid and there is no basis to find that the check of $137,763.31 was a "payment" of the assessment. Accordingly, by granting certiorari in this case and reversing the court of appeals on the mootness issue, the Taxpayer will be enabled to maintain before the court of appeals that *Cool Fuel, Inc. v. Connett*, 685 F.2d 309 (9th Cir. 1982), and *Perlowin v. Sassi*, 711 F.2d 910 (9th Cir. 1983), are contrary to a prior decision of this Court, *Laing v. United States*, *supra*, and misapply a prior decision of this Court, *Weinberger v.*

Romero-Barcelo, 456 U.S. 305 (1982), concerning the correct rule of law to follow in applying equitable principles in Section 6213(a), I.R.C. of 1954, injunction cases. Should the court of appeals not overrule its own two decisions, the Taxpayer could then seek review by this Court on the injunction issue.

CONCLUSION

For the foregoing reasons and the additional reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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